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UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

GAURAV PATHAK, et al.,

No. C 13-01823 JSW (LB)

Plaintiffs,

**ORDER REGARDING THE PARTIES'
JOINT DISCOVERY DISPUTE
LETTER DATED FEBRUARY 14, 2014**

v.

AVIS RENT A CAR SYSTEM, LLC, et al.,

[Re: ECF No. 32]

Defendants.

STATEMENT

In this employment discrimination action, Plaintiffs, who are male and are or were employees of Defendants, allege that Defendants discriminated against them and harassed them because of their gender and that they were retaliated against (and in some cases terminated) after complaining about it. *See generally* Notice of Removal, Ex. A (Complaint), ECF No. 1.¹ Plaintiffs allege claims for (1) sex discrimination in violation of California Government Code § 12940(a), (2) wrongful termination in violation of public policy, (3) failure to prevent discrimination in violation of California Government Code § 12940(k), (4) retaliation in violation of California Government Code § 12940(h), (5) violation of the Equal Protection Clause (Article 1, Section 7) of the California Constitution, (6) failure to provide rest periods in violation of California Labor Code § 226.7, (7) unfair and unlawful business practices in violation of California's Unfair Competition Law,

¹ Citations are to the Electronic Case File ("ECF") with pin cites to the electronically-generated page numbers at the top of the document.

1 California Business and Professions Code § 17200 et seq., (8) sex or gender harassment in violation
2 of California Government Code § 12940(j), and (9) injunctive relief. *See* Complaint ¶¶ 81-127.
3 Among the damages Plaintiffs seek are “general damages[,] including . . . emotional distress,
4 including but not limited to sleeplessness, recurring nightmares, anxiety, stress, depression, loss of
5 interest in socializing and other normal activities, acute uncertainty about the future, fear, loss of
6 confidence, diminished self-esteem, as well as financial hardship and insecurity, and other damages
7 to be proven at trial.” *Id.* ¶ 129.

8 Discovery is ongoing, and Defendants have deposed Plaintiff El-Salaam and Plaintiff Dajani. At
9 those depositions, Defendants’ counsel asked those two Plaintiffs whether they contend that they
10 suffered “severe” emotional distress as a result of Defendants’ alleged conduct, whether they were
11 seeking damages for that “severe” emotional distress, and whether they discussed that “severe”
12 emotional distress with their medical providers, and what the contents of those discussions were.
13 *See* El-Salaam Deposition Transcript Excerpts, ECF No. 32-1; Dajani Deposition Transcript
14 Excerpts, ECF No. 32-2. Plaintiffs’ counsel objected to Defendants’ counsel’s questions to the
15 extent that they sought legal conclusions regarding “severe” emotional distress, especially in light of
16 Plaintiffs’ “garden variety” emotional distress damages request. Plaintiffs’ counsel explicitly
17 disclaimed allegations of “severe” emotional distress. Plaintiffs’ counsel also objected to
18 Defendants’ counsel’s questions to the extent they sought the protected communications between the
19 two Plaintiffs and their medical providers, but otherwise let the two Plaintiffs answer the questions
20 in general terms. Plaintiff El-Salaam and Plaintiff Dajani then confirmed that their emotional
21 distress was “significant” and “severe,” respectively, and that they sought medical help for that
22 emotional distress.

23 Some written discovery has also been served and responded to. On one hand, according to
24 Defendants, five of the eight Plaintiffs asserted that they received medical treatment for emotional
25 distress. 2/14/2014 Letter, ECF No. 32 at 2. On the other hand, according to Plaintiffs, Plaintiffs
26 stated in their responses to interrogatories that they seek damages only for “garden variety”
27 emotional distress. *Id.* at 8. Defendants also state that Plaintiff McRae produced notes from his
28 doctor in support of his medical leaves of absence and that Plaintiff El-Salaam produced a post-

1 termination disability insurance claim form from his doctor that diagnoses him with major
2 depression and panic disorder, but Plaintiffs state that the doctors' notes produced by Plaintiff
3 McRae contain no medical information at all and that the disability form produced by Plaintiff El-
4 Salaam divulges no significant psychological condition that is not already alleged in the complaint.
5 *Id.* at 2, 8.

6 Based on the complaint's allegations regarding damages and this discovery, Defendants now
7 seek to compel the production of Plaintiffs' medical records from the health care providers who
8 treated them for emotional distress. *Id.* at 1. Defendants also seek to compel Plaintiffs to answer
9 questions at their depositions regarding the nature of their alleged injuries, their diagnoses, the
10 course of their treatment, and their prognoses (particularly, their ability to work). *Id.* Finally,
11 Defendants seek to depose Plaintiffs' medical providers. *Id.* Plaintiffs object and argue that the
12 information sought is protected by the psychotherapist privilege and that being forced to provide the
13 information would violate their privacy rights. *Id.*²

14 ANALYSIS

15 I. LEGAL STANDARD

16 A. The Psychotherapist Privilege under California Law³

17 Confidential communications between a patient and his or her psychotherapist are privileged
18 under California law. *See* Cal. Evid. Code § 1014. But there is no privilege "as to a communication
19 relevant to an issue concerning the mental or emotional condition of the patient if such issue has
20 been tendered by . . . the patient[.]" Cal. Evid. Code § 1016. "[S]ection 1016 of the Evidence Code
21 compels disclosure of only those matters which the patient himself has chosen to reveal by tendering
22 them in litigation." *In re Lifschutz*, 2 Cal. 3d 415, 426 (1970). This patient-litigant exception
23 "allows only a limited inquiry into the confidences of the psychotherapist-patient relationship,

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26 ² Pursuant to Civil Local Rule 7-1(b), the court finds this matter suitable for determination
without oral argument.

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28 ³ As this is a diversity jurisdiction lawsuit, questions regarding the application of privileges
are governed by California law. *See* Fed. R. Evid. 501. A party's waiver of privilege may be either
express or implied. *See Shooker v. Superior Court*, 111 Cal. App. 4th 923, 928 (2003).

1 compelling disclosure of only those matters directly relevant to the nature of the specific ‘emotional
2 or mental’ condition which the patient has voluntarily disclosed and tendered in his pleadings or in
3 answer to discovery inquiries.” *Id.* at 431; *see also Vinson v. Super. Ct.*, 43 Cal. 3d 833, 838 (1987)
4 (“[A] party who chooses to allege that he has mental and emotional difficulties can hardly deny his
5 mental state is in controversy.”).

6 Courts also have held, however, that a plaintiff does not put his or her mental or physical
7 condition at issue through a “simple . . . harassment claim asking compensation for having to endure
8 an oppressive work environment or for wages lost following an unjust dismissal To hold
9 otherwise would mean that every person who brings such a suit implicitly asserts he or she is
10 mentally unstable, obviously an untenable proposition.” *Vinson*, 43 Cal. 3d at 840. That is, a
11 plaintiff who brings only a “garden variety” claim for emotional distress waives neither the
12 evidentiary privileges nor her right to privacy under California and federal law. *See Davis v. Super.*
13 *Ct.*, 7 Cal. App. 4th 1008, 1017 (Cal. Ct. App. 1992) (“garden variety” personal injury action
14 alleging general damages, including mental suffering and emotional distress related to accident, did
15 not put plaintiff’s mental state at issue); *see also EEOC v. Serramonte*, 237 F.R.D. 220, 224-25 (N.D.
16 Cal. 2006) (plaintiff did not waive the psychotherapist-patient privilege under California law where
17 the plaintiff brought only a “garden-variety” claim for emotional distress damages and did not intend
18 to rely on records or on testimony by a medical or psychiatric expert to support her claim).

19 **B. Privacy Rights under California Law**

20 The California Constitution bestows a broad right of privacy. *See CAL. CONST. ART. I, § 1; El*
21 *Dorado Sav. & Loan Ass’n v. Super. Ct.*, 190 Cal. App. 3d 342, 345 (Cal. Ct. App. 1987). This right
22 extends to discovery proceedings in civil actions. *See San Diego Trolley, Inc. v. Super. Ct.*, 87 Cal.
23 App. 4th 1083 (Cal. Ct. App. 2001). However, the constitutional right to privacy is not absolute and
24 may be abridged to accommodate a compelling public interest. *Moskowitz v. Super. Ct.*, 137 Cal.
25 App. 3d 313, 316 (Cal. Ct. App. 1980). “One such interest, evidenced by California’s broad
26 discovery statutes, is ‘the historically important state interest in facilitating the ascertainment of truth
27 in connection with legal proceedings.’” *Id.* (quoting *Britt v. Super. Ct.*, 20 Cal. 3d 844, 857 (1978)).

1 **II. APPLICATION**

2 As always, the court must first determine whether the information sought is relevant. *See Fed.*
3 R. Civ. P. 26(b) (Subject to the limitations imposed by Rule 26(b)(2)(C), “[p]arties may obtain
4 discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . .”).
5 Here, among their “general damages,” Plaintiffs seek damages related to their emotional distress.
6 Defendants seek information about medical treatment related to that emotional distress. This is
7 relevant.⁴

8 Next, the court must determine whether the information sought is protected by the
9 psychotherapist-patient privilege. The court finds that it is. First, Plaintiffs bring only claims for
10 discrimination and retaliation; they do not bring separate claims for negligent or intentional
11 infliction of emotional distress. Second, Plaintiffs' damages allegation references only emotional
12 distress, not “severe” emotional distress. Third, Plaintiffs and their counsel have expressly stated
13 that they are only seeking “garden variety” emotional distress damages; they are not seeking
14 damages based on “severe” emotional distress. This express disclaimer undercuts Defendants’
15 attempt to use Plaintiff El-Salaam’s and Plaintiff Dajani’s statements during their depositions (which
16 were made in response to Defendants’ leading questions) against them. Those two Plaintiffs are not
17 lawyers, and their counsel objected to Defendants’ counsel’s questions at the time. Their statements
18 that their emotional distress was “significant” and “severe” do not trump the “garden variety”
19 damages allegations in their complaint and their counsel’s clear statement that Plaintiffs do not seek
20 damages for “severe” emotional distress.⁵ Fourth, the doctor’s notes produced by Plaintiff McRae
21 and the post-termination disability insurance claim form produced by Plaintiff El-Salaam.

22 Finally, the court also finds that the information is protected by Plaintiffs’ privacy rights. Given

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24 ⁴ Plaintiffs also appear to concede the relevance of discovery related to their emotional
distress, as long as it does not run afoul of their privacy rights or the psychotherapist privilege. *See*
25 El-Salaam Deposition Transcript Excerpts, ECF No. 32-1 (failing to make a relevance objection to
26 general questions about emotional distress suffered; Dajani Deposition Transcript Excerpts, ECF
No. 32-2 (same).

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28 ⁵ Of course, this also means that should Plaintiffs later rely upon medical records or
testimony to support a claim for emotional damages, Defendants have a good argument in favor of
excluding them.

1 that Plaintiffs seek only “garden variety” emotional distress damages, the court does not believe that
2 there is a compelling interest that outweighs Plaintiffs’ rights.

3 In sum, Plaintiffs seek only “garden variety” emotional distress damages, and the court finds that
4 the information sought by Defendants is protected by both the psychotherapist-patient privilege and
5 the privacy rights. Defendants’ request for discovery is **DENIED**.

6 **CONCLUSION**

7 This disposes of ECF No. 32.

8 **IT IS SO ORDERED.**

9 Dated: February 28, 2014



10 LAUREL BEELER
11 United States Magistrate Judge

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